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IN THE

Supreme Court of the United States

IN RE: GARY A. TAYLOR AND
WILLIAM S. HARRIS,

Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF NATIONAL MENTAL HEALTH ASSOCIATION AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The National Mental Health Association and the Judge David L. Bazelon Center for Mental Health Law respectfully move for leave to file their attached brief as *amici curiae* in support of petitioners Gary A. Taylor and William S. Harris. On April 25, 2002, a petition for writ of certiorari was filed in *In re: Gary A. Taylor and William S. Harris*, No. 01-1605. The Attorney General of Texas, who represented the respondent in the underlying habeas corpus action, declined to file a brief in opposition to the petition, informing the Court by letter that the State has no interest in this case.

On June 17, 2002, this Court called for the views of the Solicitor General. In light of the Court's request for the views of the Solicitor General, *amici curiae* believe that it may be useful for this Court to consider the views of organizations specializing in the rights and interests of individuals

with mental disabilities and therefore request permission to file this brief. Although an *amicus curiae* brief is ordinarily due within the time for filing the respondent's brief in opposition, no brief in opposition has been filed or will be filed, and the Solicitor General has not yet filed his brief.

Amicus curiae the National Mental Health Association is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. *Amicus curiae* the Judge David L. Bazelon Center for Mental Health Law is a national nonprofit organization that provides legal and policy advocacy to protect the civil rights and human dignity of individuals with mental illness and mental retardation.

Amici believe that this case warrants this Court's review because it raises a question of the greatest importance to the administration of the death penalty: whether the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(8), authorizes compensation for counsel who represent condemned prisoners in conjunction with state post-conviction competency and clemency proceedings. Although the question presented is important for all death row inmates, *amici* believe that the issue is especially important because of its bearing on the fate of prisoners with mental disabilities, many of whom cannot be executed consistent with the Eighth Amendment of the Constitution and some of whom may well be actually innocent of the crimes of which they were convicted. For these reasons, *amici curiae* respectfully ask the Court to grant this motion and to permit the filing of the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PRISONERS WHO HAVE MENTAL IMPAIRMENTS CANNOT NAVIGATE STATE COMPETENCY PROCEEDINGS WITHOUT THE ASSISTANCE OF COUNSEL. 8

II. THE STATUTORY RIGHT TO COUNSEL FOR STATE CLEMENCY PROCEEDINGS IS AN IMPORTANT SAFEGUARD AGAINST THE EXECUTION OF MENTALLY IMPAIRED INDIVIDUALS, SOME OF WHOM MAY BE ACTUALLY INNOCENT 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. Virginia,
122 S. Ct. 2242 (2002) ..... *passim*

Clark v. Johnson (*In re Taylor*),
278 F.3d 459 (5th Cir. 2002) 6

Ford v. Wainwright,
477 U.S. 399 (1986) 4, 8, 12, 18

Herrera v. Collins,
506 U.S. 390 (1993) 14

Hill v. Lockhart,
992 F.2d 801 (8th Cir. 1993) 6

In re Lindsey,
875 F.2d 1502 (11th Cir. 1989) 5, 6

King v. Moore,
No. 02-13717-P (11th Cir. Jul. 24, 2002) 5

Lowery v. Anderson,
138 F. Supp. 2d 1123 (S.D. Ind. 2001) 6

McFarland v. Scott,
512 U.S. 849 (1994) 19

Singleton v. Endell,
870 S.W.2d 742 (Ark. 1994) 9

Strickler v. Greene,
57 F. Supp. 2d 313 (E.D. Va. 1999) 6

STATUTES

21 U.S.C. § 848 ..... *passim*

28 U.S.C. § 2254 5

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 2255 5

Ala. Code § 15-12-23 (2002) 11

Ala. Code § 15-16-23 (2002) 9

Ark. Code Ann. § 16-90-506 (2001) 9, 10

Fla. Stat. Ann. § 922.07 (West 2001) 9, 11

Ga. Code Ann. § 17-10-60 to -71 (2002) 9

Ga. Code Ann. § 17-10-60 (2002) 10, 11

Ga. Code Ann. § 17-10-63 (2002) 10

Ga. Code Ann. § 17-10-66 (2002) 11, 12

Miss. Code Ann. § 99-19-57 (West 2001) 9, 10

Mo. Rev. Stat. § 552.060 (2001) 9

Neb. Rev. Stat. § 29-2537 (2001) 9

Tex. Code Crim. Proc. Ann. art. 46.05 (Vernon 2002) 9, 11

RULES

Supreme Court Rule 37.6 1

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VIII 3, 4, 8

OTHER AUTHORITIES

ABA Standards for Criminal Justice (2d ed. 1989) 9

Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for*

TABLE OF AUTHORITIES
(continued)

Page(s)

the Future, 22 N.Y.U. REV. L. & SOC. CHANGE 59 .....7, 15

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Death Penalty and People with Mental Illness, available at http://www.nmha.org/position/deathpenalty.cfm .6, 15, 16

James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).....10, 15

John L. Farringer, IV, Note, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed*, 54 VAND. L. REV. 2441 (2001).....11

Dorothy O. Lewis, M.D., et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).....10, 16

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TABLE OF AUTHORITIES
(continued)

Page(s)

Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CALIF. CRIM. L. REV. 3, *available at* http://boalt.org/CCLR/v1/v1slobogintext.htm 16, 17

www.deathpenaltyinfo.org/clemency.html 18

www.deathpenaltyinfo.org/DrowInfo.html.....6

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BRIEF OF NATIONAL MENTAL HEALTH ASSOCIATION AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This brief is filed on behalf of the National Mental Health Association and the Judge David L. Bazelon Center for Mental Health Law as *amici curiae* in support of petitioners, with the written consent of the petitioners.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the National Mental Health Association and the Bazelon Center, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. A letter of consent from petitioners is filed with this brief. The State of Texas filed a statement of non-interest in the case.

INTEREST OF AMICI CURIAE

The National Mental Health Association ("NMHA") is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. With 340 affiliates in 43 states and the District of Columbia, NMHA has worked toward eliminating discrimination against and public misconceptions about people with mental illness since 1909. NMHA believes that mental illness can influence an individual's mental state at the time he or she commits a crime. NMHA also believes mental illness should be taken into account as a mitigating factor during all phases of a potential death penalty case, including post-conviction clemency and competency proceedings, and that condemned prisoners who have mental illness should not be executed. NMHA has urged clemency authorities in several states to commute death sentences to life in prison because of the existence of mental illness.

The Judge David L. Bazelon Center for Mental Health Law ("the Bazelon Center") was formed in 1972 and is the leading national legal advocate for people with mental illness and mental retardation. The Bazelon Center promotes the civil rights and human dignity of individuals with mental disabilities through litigation, policy advocacy, education, and training. The Center has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in numerous additional cases before this Court.

NMHA and the Bazelon Center believe that this case warrants this Court's review because there is an established intercircuit conflict with regard to the proper interpretation of 21 U.S.C. § 848(q), and because the legal question involved will have a substantial impact on the number of mentally impaired prisoners that are wrongly executed. *Amici* believe that mental disabilities should always be taken into

account during state post-conviction competency and clemency proceedings. Without a right to counsel, however, the vast majority of death row inmates with mental illness and mental retardation are incapable of navigating those proceedings. Because execution of mentally impaired individuals raises questions of the gravest importance under the Eighth Amendment, this Court's expeditious resolution of this controversy is warranted.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit presents an intercircuit conflict on a question of great importance to the administration of the death penalty: whether the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(8), authorizes compensation for counsel who represent condemned prisoners in conjunction with state post-conviction competency and clemency proceedings. Although the question presented is important for all death row inmates, *amici* believe that the issue is especially important because of its bearing on the fate of prisoners with mental disabilities, many of whom cannot be executed consistent with the Eighth Amendment of the Constitution and some of whom may well be actually innocent of the crimes of which they were convicted. As this Court recently recognized in the context of mental retardation, individuals with mental disabilities are more likely than the average person to be wrongfully convicted and wrongfully sentenced to death. Yet those same individuals are also less likely than others to be able to navigate successfully the post-conviction competency and clemency proceedings that hold their last hope of avoiding an unconstitutional execution. Upholding Congress' clear intent to provide counsel for death row inmates for "such competency proceedings and proceedings for executive and other clemency as may be available to the defendant," *id.*, is one significant means by which the risk of unconstitutional executions can be minimized.

Sixteen years ago, in *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that executing an insane person violates the prohibition against cruel and unusual punishment. The determination of the procedures to be used in deciding which individuals are mentally incompetent is, however, largely left to the states. As discussed in this brief, the post-conviction procedures that states have created to identify incompetent inmates are complicated and would be difficult to navigate pro se even for a prisoner in command of all his faculties. Unfortunately, without the aid of counsel, it is the prisoners with the greatest psychological or cognitive impairments – the ones most likely to meet the standards of mental incompetence articulated by the states – who are least likely to succeed in invoking the protections of the Eighth Amendment. Those individuals are also unlikely to be able to persuade clemency authorities to consider their mental impairment as a mitigating factor justifying commutation of a death sentence to a term of life imprisonment.

This Court should address the proper interpretation of section 848(q)(8) now. As the petitions for certiorari correctly explain, there is a clear conflict among the courts of appeals. Indeed, the circuits that include the most active death penalty jurisdictions have already weighed in on the question, with the Fifth and Eleventh Circuits clearly holding that counsel should not be compensated for representation in conjunction with state competency and clemency proceedings, and the Eighth Circuit clearly holding that counsel should be compensated. Thus, the lower courts are in need of this Court's guidance with regard to the proper interpretation of section 848(q)(8).

Even more importantly, postponing resolution of the question at hand would increase the risk that mentally impaired individuals in the jurisdictions denying compensation will be executed in the meantime because their impairments are not properly accounted for in state competency and

clemency proceedings. In light of the inherent unreliability of the convictions of people with mental disabilities, there is also a substantial possibility that an innocent person will be executed as a result. Accordingly, *amici* urge this Court to grant certiorari and resolve this question now.

ARGUMENT

Section 848(q) of Title 21 by its terms grants to all indigent state and federal condemned inmates a right to counsel and to expert and investigative services for post-conviction proceedings. *See* 21 U.S.C. § 848(q)(4)(B). The right to counsel and other services encompasses not only representation for habeas corpus proceedings under sections 2254 or 2255 of Title 28, *see id.*, but also for "such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Id.* § 848(q)(8) (emphasis added). As explained in detail in the two petitions for certiorari,[2] that right to counsel covers both federal and state post-conviction clemency and competency proceedings, not just federal proceedings. *See* Pet. 9-22.

Despite Congress' clear intent, however, the Fifth Circuit in the decisions below held that section 848(q)(8) does not authorize compensation for attorneys in *state* clemency and competency proceedings. *See* Pet. 8a, 10a. The decisions below deepened an existing conflict of authority between the Eleventh Circuit, which like the Fifth Circuit holds that compensation for such proceedings is not available, *see In re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989); *King v. Moore*, No. 02-13717-P (11th Cir. Jul. 24, 2002) (denying appointment of counsel for state post-conviction proceedings

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[2] This brief addresses the statutory right to counsel for indigent prisoners in state competency and clemency proceedings as raised in the petition for a writ of certiorari in *In re: Taylor and Harris*. However, the arguments in this brief also apply to issues raised in the closely related petition filed in *In re: Wischkaemper and Taylor*, No. 01-1623.

based on holdings of *Lindsey* and *Clark v. Johnson* (*In re Taylor*), 278 F.3d 459 (5th Cir. 2002)), and the Eighth Circuit, which clearly holds that counsel should be compensated. *See Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993).[3]

The question that is the subject of this conflict of authority – whether indigent condemned prisoners will have access to counsel in conjunction with state competency and clemency proceedings – is of critical importance to the many prisoners with mental disabilities on death row. There are approximately 3,718 state and federal inmates awaiting capital punishment nationwide, *see* www.deathpenaltyinfo.org/DrowInfo.html, and a significant percentage of them are impaired to some degree by mental illness, mental retardation, or both. "[I]t is estimated that 5-10 percent of people on death row have a serious mental illness." *Death Penalty and People with Mental Illness*, *available at* http://www.nmha.org/position/deathpenalty.cfm [hereinafter *People with Mental Illness*]. In addition, a large number of death

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[3] This intercircuit conflict is established and real. Courts in the Eighth Circuit routinely find that the procedural requirements of *Hill* are satisfied and grant compensation requests for such attorney services, whereas courts in the Fifth and Eleventh Circuits routinely deny such claims. Moreover, in practical terms, the conflict of authority encompasses more than three circuits. District courts in the Fourth and Seventh Circuits have held that fees for clemency and/or competency proceedings are recoverable, *see Strickler v. Greene*, 57 F. Supp. 2d 313, 316 (E.D. Va. 1999); *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) (granting fees based on the plain language of section 848(q)(8) and the "straightforward and persuasive reasoning" of *Hill v. Lockhart*), and the State's statement of non-interest in this case suggests that it is unlikely that grants of fees in those jurisdictions will be appealed. In addition, the First, D.C., and Federal Circuits have no death penalty docket to speak of, so those circuits cannot be expected to weigh in on this controversy.

Counsel for petitioners has informed *amici* that petitioners plan to file a supplemental brief that will provide additional information to the Court about the extent of the intercircuit conflict.

row inmates are mentally retarded. *See Offending Justice*, available at http://www.ncadp.org/html/fact6.html (approximately "10% of the death row population may be afflicted with mental retardation"). Some prisoners have a mental illness and are mentally retarded. *See, e.g.*, Frank Menolascino, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977) (estimating that approximately 30 percent of mentally retarded individuals also suffer from mental illness); Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since* Penry *and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 71-72 (1996) ("[T]he incidence of mental illness among retarded people is estimated to be quite high, between twenty and sixty-four percent.").

For those mentally impaired inmates, the statutory right to counsel at post-conviction state competency and clemency proceedings is a much needed safeguard on our nation's imperfect system of capital punishment for at least two reasons. *First*, the right to counsel for state competency proceedings is likely to prevent some executions of individuals with mental disabilities who satisfy the standard for incompetency-to-be-executed and whose executions would therefore be unconstitutional under the Eighth Amendment. As explained below, given the complexity of state competency proceedings and the high evidentiary thresholds that must be met, it is those inmates most likely to satisfy the criteria that are also least likely to be able to make such a showing without the assistance of counsel. *Second*, the right to counsel for state clemency proceedings provides an important safeguard that may spare from execution some impaired individuals who are actually innocent of the crimes of which they were convicted, or who should not have been sentenced to death. As this Court has acknowledged, a "disturbing number" of death row inmates have been exonerated in recent years. *Atkins v. Virginia*, 122 S. Ct. 2242, 2252 n.25 (2002). This

Court has also recognized that, for a number of reasons, the convictions and death sentences of mentally impaired defendants are less reliable than the convictions and death sentences of defendants without mental disabilities. With the assistance of counsel at clemency proceedings, some wrongly convicted or sentenced individuals may be spared execution.

For these and other reasons, this Court should grant certiorari and resolve the question presented here.

I. PRISONERS WHO HAVE MENTAL IMPAIRMENTS CANNOT NAVIGATE STATE COMPETENCY PROCEEDINGS WITHOUT THE ASSISTANCE OF COUNSEL.

In *Ford*, this Court held that executing an insane person violates the Eighth Amendment. "It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." 477 U.S. at 417.[4] The Court, however, left it to the States to determine how to implement these constitutional prohibitions. *See id.* at 416-17 ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."). As the Court recognized, "[i]t may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity." *Id.* at 417. Applying this guidance, the states have

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[4] Just this past term, in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), this Court extended that principle to bar capital punishment of mentally retarded individuals. The Court explained that it was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty," and "therefore conclude[d] that such punishment is excessive." *Id.* at 2252. We explain below why many of the concerns articulated by the Court in *Atkins* apply equally to the context of mental illness.

implemented post-conviction competency procedures that would be very difficult for any inmate without formal legal training – much less a mentally impaired individual – to handle successfully without a lawyer's assistance.

In many states (and in nearly all of the states in the Fifth and Eleventh Circuits), for example, the inmate must make a motion to the proper court in order to initiate a competency proceeding.[5] *See, e.g.*, Fla. Stat. Ann. § 922.07 (West 2001); Ga. Code Ann. § 17-10-60 to -71 (2002); Tex. Code Crim. Proc. Ann. art. 46.05 (Vernon 2001); Ala. Code § 15-16-23 (2002); Miss. Code Ann. § 99-19-57 (West 2001). In order to bring such a motion pro se, the inmate must first recognize that he is mentally impaired. Unfortunately, many inmates with mental illness and mental retardation[6] are not aware of

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[5] In other states, competency proceedings are triggered by the State itself. *See, e.g.*, Neb. Rev. Stat. § 29-2537 (2001) (providing that the custodian of a prisoner sentenced to death who appears to be mentally incompetent shall give notice to a judge of the district in which the prisoner was tried and sentenced); Mo. Rev. Stat. § 552.060(2) (2001) (director of the department of corrections shall initiate a proceeding if he "has reasonable cause to believe that any inmate then in confinement in a correctional facility and sentenced to death has a mental disease or defect excluding fitness for execution"); Ark. Code Ann. § 16-90-506(d)(1) (2001). Even with an attorney's assistance, it may be difficult or impossible for a prisoner in those jurisdictions to obtain a competency evaluation. *See, e.g., Singleton v. Endell*, 870 S.W.2d 742 (Ark. 1994).

[6] The outcome of this case is likely to affect the fates of death row inmates with mental retardation as well as those with mental illness. The ABA Criminal Justice Mental Health Standards apply the same standard to mental illness and mental retardation for purposes of determining competency to be executed, and therefore many states will probably consider the issue of mental retardation at competency proceedings. *See* ABA Criminal Justice Mental Health Standards 7-5.6, 290 (2d ed. 1989) ("A convict is incompetent to be executed if, as a result of mental illness or mental retardation the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks

their impairments, will not acknowledge those impairments, or fail to recognize the relevance of those impairments to their conviction or sentence. *See, e.g.*, Dorothy O. Lewis, M.D., et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 844 (1986) (describing instances where death row inmates were unaware of the existence or relevance of their mental impairments); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985) (explaining that individuals with mental retardation often attempt to cover up their disability, and that attorneys often fail to detect it); *see also infra*. Thus, without the assistance of an attorney, mentally impaired inmates are unlikely ever to realize that they should bring a motion.

Even if a prisoner with a mental disability recognizes the need to bring a motion, it will be difficult for him to obtain a hearing without the assistance of counsel. *See, e.g.*, Ga. Code Ann. § 17-10-63 (2002) (applicant "shall set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed"). If he is lucky enough to get a hearing, he still must prove that he satisfies the criteria for insanity. In most states, the burden is on the prisoner to prove that, because of a mental condition, he "is presently unable to know why he or she is being punished and understand the nature of the punishment." *Id.* § 17-10-60.[7] It is difficult to see how a person who meets

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sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court."). The right to counsel in such proceedings is obviously just as important to mentally retarded prisoners as to those who have mental illness.

[7] *See also, e.g.*, Miss. Code Ann. § 99-19-57 ("[A] person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which

that standard could possibly submit the required papers and proof to establish that he is entitled to relief without the assistance of an attorney and other necessary services, such as an expert trained in matters of mental illness. *Cf.* John L. Farringer, IV, Note, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed*, 54 VAND. L. REV. 2441, 2488 (2001) (explaining the difficulty that even judges have in evaluating evidence with regard to a prisoner's competency).

The difficulties faced by indigent prisoners raising claims of mental incompetence are not ameliorated by state law. Of the states encompassed by the intercircuit conflict here, only Florida provides a statutory right to counsel in conjunction with those proceedings. *See* Fla. Stat. Ann. § 922.07(1).[8] And only a few states appear to provide compensation for the appointment of an expert witness. *See* Ark. Code Ann. § 16-90-506 (providing a "reasonable allowance" for an independent mental health evaluation); Ga. Code Ann. § 17-10-66 (2002) (under certain circumstances, "the court shall appoint an expert to make an examination of the applicant . . . [and p]ayment for such expert shall be made by the Department of Corrections").[9]

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awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."); Ga. Code Ann. § 17-10-60 ("The term 'mentally incompetent to be executed' means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment."); Tex. Code Crim. Proc. Ann. art. 46.05(h) ("A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed.").

[8] One state, Alabama, also provides for judicial discretion to appoint counsel in competency proceedings. *See* Ala. Code § 15-12-23 (2002).

[9] To *amici's* knowledge, no other state in the Fifth, Eighth, or Eleventh Circuits has a statute that provides for the appointment of counsel or

Deprivation of the federally provided right to counsel at issue here effectively leads to the very situation found unconstitutional by this Court in *Ford*. In that case, this Court recognized that a competency hearing at which only state-appointed psychiatrists testified – and the inmate and his counsel were not permitted to testify – violated the Eighth Amendment. *See* 477 U.S. at 403-04. In so ruling, the Court expressly found that "without any adversarial assistance from the prisoner's representative . . . [,] the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision." *Id.* at 414. Similarly here, if inmates are unable to avail themselves of the services of court-appointed counsel and experts under section 848(q), the risk of an erroneous decision with regard to competence is unacceptably high.

Indeed, tragically, it is those inmates most likely to satisfy the criteria that are least likely to be able to make such a showing without the assistance of counsel. This outcome flies in the face of the Court's prohibition on the execution of the mentally incompetent. It invites arbitrary imposition of the death penalty upon individuals incapable of communicating their own illness, leaving them at the mercy of the state in much the same way that the Florida procedure invalidated in *Ford* did. Enforcing the statutory right to counsel provided for by Congress in section 848(q) is the best way to

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independent experts for competency-to-be-executed hearings. Even in those states that do provide for the appointment of an expert witness, it is not clear how an indigent prisoner would find such an expert without the assistance of counsel. Moreover, the right to an expert witness may be inadvertently waived if the inmate fails to make his request at the proper time. *See, e.g.*, Ga. Code Ann. § 17-10-66(b) ("The applicant shall further submit [simultaneously] with the motion a specific statement as to the particular expert requested, the nature of the examination to be conducted, the time period within which an examination can be conducted and an estimate of the expenses to be incurred.").

avert some of those unconstitutional executions without imposing an undue burden on the state.

II. THE STATUTORY RIGHT TO COUNSEL FOR STATE CLEMENCY PROCEEDINGS IS AN IMPORTANT SAFEGUARD AGAINST THE EXECUTION OF MENTALLY IMPAIRED INDIVIDUALS, SOME OF WHOM MAY BE ACTUALLY INNOCENT.

At stake in this litigation is not only the fate of individuals who, although fully competent at the time of their offense and trial, have become incompetent prior to execution. Also hanging in the balance is the fate of numerous death row inmates who were mentally impaired even at the time of their offense, conviction, and sentence, but whose impairment for any number of reasons was not detected, revealed, or given credence at that time. For those inmates, whose convictions and sentences are inherently less reliable than those of non-impaired defendants, enforcing the statutory right to counsel at clemency proceedings provides a critical safeguard against wrongful execution. With the assistance of counsel, some mentally impaired individuals on whom the death penalty was unjustifiably imposed or who were wrongly convicted despite their innocence may have their death sentences commuted despite failing to satisfy the exceedingly high state-established standards for incompetency-to-be-executed.

Last Term, in *Atkins v. Virginia*, this Court expressed concern about the unreliable convictions and unjustified death sentences that have been imposed in recent years, particularly on defendants who are mentally impaired:

> Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit.

122 S. Ct. at 2252 n.25; *see also Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor & Kennedy, JJ., concurring) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.").

The Court was also troubled by the fact that, for a variety of reasons, "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution":

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, [438 U.S. 586, 605 (1978)], is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 122 S. Ct. at 2251-52; *see generally* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419 (Fall 1990).

Although *Atkins* dealt specifically with the issue of mentally retarded defendants, the Court's reasoning also applies to mentally ill individuals, many of whom face very similar

problems in our criminal justice system.[10] Just like mental retardation, "mental illness can influence an individual's mental state at the time he or she commits a crime, can affect how 'voluntary' and reliable an individual's statements might be, can compromise a person's competence to stand trial and to waive his or her rights, and may have an effect upon a person's knowledge of the criminal justice system." *People with Mental Illness*, *supra*. Like mentally retarded offenders, mentally ill offenders are also less culpable for their actions:

> [P]eople proven to be psychotic at the time of the offense are as volitionally and cognitively impaired at that crucial moment as children and people with mental retardation who commit crimes. If anything, the delusions, command hallucinations, and disoriented thought processes of those who are mentally ill represent greater dysfunction than that experienced by most 'mildly' retarded individuals (defined as having an IQ of between 55 and 70) and by virtually any non-mentally ill teenager. Even certain types of personality disorders, among them paranoid personality and borderline personality, may be associated with gross impairment that equals or exceeds the level of impairment normally present in these other subgroups.

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[10] There are, of course, important differences between mental illness and mental retardation. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 (1985) ("[T]he cardinal difference [between mental retardation and mental illness] is that . . . [m]entally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn."); *see generally* Bing, *supra*, at 71-72 (discussing differences between mental retardation and mental illness). But, as this brief demonstrates, both groups face similar obstacles in our criminal justice system.

Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CALIF. CRIM. L. REV. 3, ¶ 12, *available at* http://boalt.org/CCLR/v1/v1slobogintext.htm.

Although our criminal justice system should in theory take account of the lower culpability of mentally ill defendants at the trial and sentencing phase, the empirical evidence demonstrates that the opposite is often true. Similar to the mental retardation context, "our current system of fact-finding in capital cases fails to identify who among those convicted and sentenced to death actually has a mental illness." *People with Mental Illness*, *supra*. As a result, "there is reason to believe that individuals with mental illness are being executed without the criminal justice system knowing of the existence of that illness and, therefore, without the requisite consideration of whether that mental illness may be a mitigating factor in these cases." *Id.* For example, in one study of fifteen death row inmates believed to be representative of the general death row population, "six subjects were found to be chronically psychotic," three were "episodically psychotic," and two suffered from bipolar mood disorder. Lewis et al., *supra*, at 840. Yet those "serious disorders were not previously identified and presented in the original trials, during sentencing, or in the course of subsequent appeals." *Id.* at 844. The researchers concluded:

> Probably a major reason for the failure to identify these vulnerabilities previously was that nobody suspected their existence and hence nobody looked for them. Moreover, contrary to the popular notion that murderers are simply sociopaths who will feign illness to 'get off,' most of the subjects did not consider themselves sick or impaired and did not request specialized evaluation.

Id. (describing instances where death row inmates were unaware of the existence or relevance of their mental impairments).[11]

Also as with mental retardation, despite the fact that "[e]very state death penalty statute, either explicitly or implicitly, stipulates that mental illness at the time of the offense be considered as a possible mitigating circumstance," "research on the behavior of capital sentencing bodies strongly suggests that judges and juries often treat evidence of mental illness in precisely the opposite manner." Slobogin, *supra*, ¶¶ 17, 19; *see id.* ¶¶ 20-23 (summarizing research showing that death sentence is more likely to be imposed if defendant presents evidence of mental illness or relies unsuccessfully on an insanity defense). A study using mock jurors found that those jurors who are willing to impose the death penalty are more likely to believe that "mental state arguments by people with mental illness are 'a ruse and an impediment to the conviction of criminals.'" *Id.* ¶ 21. Other research suggests that jurors may fear defendants who have mental illness and may therefore impose a harsher sentence, perhaps using the defendant's perceived "future dangerousness" as an aggravating factor. *See id.* ¶¶ 22, 23. In fact, one study of 128 cases in Georgia found that "a failed insanity defense was one of the most accurate predictors of who would receive the death penalty, ahead of such variables as prior record and commission of another crime at the time of the homicide, and behind only the number of official aggravating factors proven at sentencing." *Id.* ¶ 19. In *Atkins*, this

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[11] Thus, although mental illness differs from mental retardation because it is possible for a prisoner to develop a mental illness after he is sentenced (whereas a mentally retarded person presumably is always mentally retarded), many instances where mental illness is first raised in pre-execution proceedings may have involved a mental illness that was actually present but undiscovered by the court at the time of the inmate's offense and trial.

Court acknowledged that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 122 S. Ct. at 2252 (citing *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989)). The same observation applies to reliance on mental illness as a mitigating factor.[12]

Thus, as in the mental retardation context, the convictions and death sentences of mentally ill offenders are inherently much less reliable than those of non-impaired offenders. For those mentally impaired inmates whose impairments were not adequately taken into account during the conviction and sentencing phase – but who cannot satisfy the legal definition of incompetency-to-be-executed – the right to counsel at clemency proceedings is a critical final safeguard against wrongful execution. *See, e.g.*, http://www.deathpenaltyinfo.org/clemency.html (listing reasons for commutation of death sentences, including those of Bobbie Shaw in 1993, Calvin Swann in 1999, and Alexander Williams in 2002, all based at least in part on mental disabilities). Yet, for reasons similar to those that arise in the context of competency proceedings, *see supra*, prisoners with mental disabilities who lack access to counsel and expert witnesses are unlikely to be able to persuade a clemency authority that their lives should be spared due to mental illness.

There can be no doubt that the question raised by the petition in this case is critically important. *See Ford*, 477 U.S. at 411 (plurality opinion of Marshall, J.) (recognizing that "execution is the most irremediable and unfathomable of

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[12] Because of this tendency to penalize individuals with mental illness, even where an attorney discerns a mental illness or disability in her client, she may not raise it during trial and sentencing. In such cases, it is even more important that a condemned prisoner has counsel to raise the issue in post-conviction competency and clemency proceedings.

penalties," and that therefore "death is different") (citations omitted). There also can be no doubt that the Fifth Circuit got it wrong. Pet. 9-22. The plain text of section 848(q)(8) provides that an attorney appointed to represent an inmate in federal habeas proceedings "*shall* also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. § 848(q)(8) (emphasis added). Petitioners correctly state that "Congress made clear that people sentenced to death should not be abandoned by their lawyers as an execution date nears." Pet. 9. As this Court recognized in *McFarland v. Scott*, 512 U.S. 849 (1994), Congress enacted section 848(q) based on a determination that "quality legal representation is necessary in capital habeas corpus proceedings in light of '*the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.*'" 512 U.S. at 855-56 (quoting 21 U.S.C. § 848(q)(7)) (emphasis added). In light of the plain text of the statute and the importance of ensuring that representation is provided for death row inmates in state competency and clemency proceedings, this Court should grant certiorari and reverse the decision of the Fifth Circuit.

CONCLUSION

For the foregoing reasons and those set forth persuasively by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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